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# The European Court of Human Rights supervising the execution of its judgments

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[journals.sagepub.com/home/nqh](https://journals.sagepub.com/home/nqh)**Lize R. Glas**

Faculty of Law, Radboud University, the Netherlands

## Abstract

The European Convention on Human Rights ('Convention') provides that the Committee of Ministers shall supervise the execution of the European Court of Human Rights' ('Court') judgments. This article aims to address the question whether, despite what the Convention provides, the Court is involved in supervising the execution of its judgments. Additionally, this article addresses the question what the Court does when it is engaged in this exercise. In order to answer these two questions, four aspects of the Court's practice that are linked to the execution process are examined. These are the four aspects of interest: just-satisfaction judgments under Article 41 ECHR, follow-up cases concerning individual measures, follow-up cases concerning general measures and the pilot-judgment procedure. The analysis of these aspects will lead to the conclusion that the Court indeed engages in supervising execution, but also that this does not mean that the Court is taking on the Committee's task and that supervising execution has not become in any way part of the Court's day-to-day work.

## Keywords

European Court of Human Rights, European Convention on Human Rights, Committee of Ministers, supervision, execution, implementation, just satisfaction, follow-up cases, pilot judgments

## Introduction

To many, the choice of topic for this article, as is apparent from the title, may come across as odd, since the European Court of Human Rights ('Court') has 'consistently ruled that it does not have jurisdiction to verify [...] whether a Contracting Party has complied with the obligations imposed

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### Corresponding author:

Lize R. Glas, Assistant Professor, Department of International and European Law, Faculty of Law, Radboud University, Houtlaan 4, 6525 XZ Nijmegen, the Netherlands.

E-mail: [l.glas@jur.ru.nl](mailto:l.glas@jur.ru.nl)

on it by one of the Court's judgments'.<sup>1</sup> This statement is in line with the European Convention on Human Rights ('Convention' or 'ECHR'), which prescribes in Article 46(2) that the Committee of Ministers ('Committee') 'shall supervise' the execution of the Court's judgments.<sup>2</sup> The Court has confirmed that reviewing the execution measures adopted by the respondent State to secure the rights of the applicants is 'a matter for the Committee'.<sup>3</sup> Moreover, the Committee's newly gained power<sup>4</sup> to ask the Court whether a State has failed to execute a judgment<sup>5</sup> 'seems to confirm', according to the Court, that it cannot supervise execution.<sup>6</sup> By giving the Committee – and not the applicant, the Court or individual States – the power to institute infringement proceedings, the new procedure confirms the status quo:<sup>7</sup> the Committee supervises execution.<sup>8</sup>

Despite what the Convention prescribes and what the Court maintains regarding execution, this article aims to address the question whether the Court is involved in supervising the execution of its judgments and, if so, what it does when engaging in this exercise. The Court is involved in supervising execution when it pronounces on the measures taken by the respondent State to execute a judgment or the lack thereof. The question is prompted by the already rather elaborate body of literature that describes that the Court increasingly endeavours 'to exert influence over the execution of its judgments',<sup>9</sup> by indicating in its judgments which execution measures the respondent State should take.<sup>10</sup> The current article wants to examine whether the Court has now gone a

1. *Kurić and Others v Slovenia* App no 26828/06 (ECtHR, 12 March 2014), para 142; *Kudeshkina v Russia* App no 28727/11 (ECtHR, 17 February 2015), para 29; See also *Bochan v Ukraine (no 2)* App no 22251/08 (5 February 2015), para 33.
2. Article 46(1) ECHR requires that the States 'abide by the final judgment of the Court in any case to which they are parties'. Executing a judgment requires putting the applicant, as far as possible, in the same situation as prior to the violation, ending the previous violation and preventing new violations. See Rule 6(2)(b) of the Committee for the supervision of the execution of judgments and the terms of friendly settlements. See also, for example, *Navalnyy v Russia* App no 29580/12 et al (ECtHR, 15 November 2018), para 182.
3. *Ivanjoc and Others v Moldova and Russia* App no 23687/05 (ECtHR, 15 November 2011), para 91; See also *Cyprus v Turkey* App no 25781/94 (ECtHR, 12 May 2014), para 62.
4. Protocol 14 to the ECHR, which amended the Convention to include this power, entered into force on 1 June 2010. See for more information about the procedure generally Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66 International & Comparative Law Quarterly 467. The Committee has started infringement proceedings once, see *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECtHR, 22 May 2014). The procedure has resulted in this judgment *Ilgar Mammadov v Azerbaijan* App No 15172/13 (ECtHR, 29 May 2019).
5. Article 46 (4,5) ECHR.
6. *Sidabras and Others v Lithuania* App nos 50421/08 and 56213/08 (ECtHR, 23 June 2015), para 103; *UMO Ilinden – PIRIN and Others v Bulgaria (no 2)* App nos 41561/07 and 20972/08 (ECtHR, 18 October 2011), para 66; See also Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' 2006 Human Rights Law Review 6, 403, 411; *V gT v Switzerland (no 2)* ECHR 2009-IV 1, Dissenting opinion of Judge Malinverni joined by Judges Birsan, Myjer and Berro-Lefèvre, para 16; *Cyprus v Turkey* (n 3), Partly concurring opinion of Judges Tulkens, Vajić, Raimondi and Bianku, joined by Judge Karakaş, paras 8-11.
7. See also *Egmez v Cyprus* App no 12214/07 (ECtHR, 18 September 2012), para 36.
8. Article 46(2) ECHR.
9. Helen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2016) 25 EJIL 829, 839.
10. eg Lucius Caflisch, 'New Practice Regarding the Implementation of the Judgments of the Strasbourg Court' (2006) 16 Italian Yearbook of International Law 3; Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski* and *Sejdovic* Cases' (2007) 7 Human Rights Law Review 396; Elisabeth Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights* (Human Rights Files No 19, 2nd edn, Council of Europe 2008), 17-32; Ingrid Nifosi-Sutton,

step further and also supervises the implementation of some execution measures. This descriptive question is connected to the debate between the Court's Judges on the normative question, which is not the subject of this article, whether the Court *should* play a (more robust) role in supervising the execution of its judgments and in execution matters more generally, by, for example, ordering execution measures.<sup>11</sup> The more general topic of this article – the execution of the Court's judgments – fits in with the ever-greater emphasis that is placed on the immense importance of the full and prompt execution of the Strasbourg judgments.<sup>12</sup>

This research builds on and elaborates on an article by Keller and Marti about the judicialization of the execution process. In this article, they, *inter alia*, identify four aspects of the Court's procedural practice as part of which the Court intervenes in the post-judgement stage.<sup>13</sup> Like Keller and Marti, this article similarly looks into four such aspects, although the aspects are categorised here somewhat differently from how Keller and Marti categorise them. By examining these four aspects, this article constructs an answer to the question whether the Court is involved in supervising the execution of its judgments and, if so, what it does when engaging in this exercise. These are the four aspects of interest: just satisfaction judgments under Article 41 ECHR (Section

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'The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective' (2010) 23 Harvard Human Rights Journal 51; Maya Hertig Randall and Xavier-Baptiste Ruedin, "'Judicial Activism' et exécution des arrêts de la Cour européenne des Droits de l'Homme" (2010) 82 Revue trimestrielle des droits de l'homme 421; Hans-Joachim Cremer, 'Prescriptive orders in the Operative Provisions of Judgments of the European Court of Human Rights: Beyond *res judicanda*', in Anja Seibert-Fohr and Mark E Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Routledge 2014); Jannika Jahn, 'Ruling (In)directly through Individual Measures? Effect and Legitimacy of the ECtHR's New Remedial Power' (2014) 74 ZaöRV 1; Linos-Alexander Sicilianos, 'The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments Under Article 46 ECHR' (2014) 32 NQHR 234; Linos-Alexander Sicilianos, 'The Role of the European Court of Human Rights in the Execution of its own Judgments: Reflections on Article 46 ECHR' in Anja Seibert-Fohr and Mark E Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Routledge 2014); Lize R Glas, *The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System* (Intersentia 2016), 385-394; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures' (2017) 17 Human Rights Law Review 451; Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019) 19 HRLR 83. See for authors writing about the Court supervising the execution of its judgments Xavier-Baptiste Ruedin, *Exécution des arrêts de la Cour européenne des droits de l'homme* (2009 Bruylant), 43-68; Giorgio Malinverni, *La compétence de la Cour pour surveiller l'exécution de ses propres arrêts*, in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds), *La Convention européenne des droits de l'Homme, un instrument vivant*, Mélanges Christos L. Rozakis (2011 Bruylant); Keller and Marti (n 9), 845-850.

11. See, eg, the following opinions in *Moreira Ferreira v Portugal (no 2)* App no 19867/12 (ECtHR, 11 July 2017): Joint dissenting opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølborg and O'Leary, paras 2-8; Dissenting opinion of Judge Pinto de Albuquerque joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović and Kūris Pinto, paras 18, 57; Dissenting opinion of Judge Kūris, joined by Judges Sajó, Tsotsoria and Vehabović, para 4. See also *Fabris v France* ECHR 2013-I 381, Concurring opinion of Judge Pinto de Albuquerque and *Sidabras and Others* (n 6), Concurring opinion of Judge Keller, para 6. Keller (in her capacity of scholar) and Marti (n 9) also address this normative question, see 849.
12. Eg Brussels Declaration, 27 March 2015, preamble, para 10 and under (C); CDDH, 'The longer-term future of the European Court of Human Rights', 11 December 2015, paras 132-170; Copenhagen Declaration, 13 April 2018, paras 19-26. See also Jernej Letnar Čerňič, 'A Glass Half Empty? Execution of Judgments of the European Court of Human Rights in Central and Eastern Europe' (2016) 15 Baltic Yearbook of International Law Online 286, 287; Londras and Dzehtsiarou (n 4), 469-472.
13. Keller and Marti (n 9), 846-848.

2), follow-up cases concerning individual measures (Section 3), follow-up cases concerning general measures (Section 4) and the pilot-judgment procedure (Section 5). These aspects have been selected because they are linked to the execution process. Therefore, if the Court would be engaged in supervising the execution of its judgment at all, it would do so in the context of these procedural practices. The focus on procedural practices as they emanate from the Court's case-law, means that this article does not look into any informal influence that the Court may have on the execution process before the Committee.<sup>14</sup>

## Just satisfaction judgments under Article 41 ECHR

The Court reserves the question of just satisfaction in its judgment on the merits 'if the question is not ready for decision'.<sup>15</sup> Such subsequent just satisfaction judgments are rare: only about two percent of the Court's judgments solely concern just satisfaction,<sup>16</sup> many of which are about the right to the protection of property.<sup>17</sup> Keller and Marti propose that 'dissociating the issue of just satisfaction [...] from the judgment on the merits has [...] enabled the [Court] to inquire into how the latter has been implemented'.<sup>18</sup> This Section elaborates on their findings.

Clearly, the Court can only comment on the execution measures if the respondent State took such measures, which happens in the minority of cases in which the question of Article 41 ECHR is reserved. These measures usually take the form of new proceedings before a domestic court to redress the violation found in Strasbourg, for example, by awarding compensation to the victim of the violation. The Court 'reserves ... the right to verify whether the outcome of [these] proceedings – and their length – satisfy' Article 41 ECHR.<sup>19</sup> This statement is the logical consequence of the fact that the Court only needs to award just satisfaction if the national proceedings have not remedied the violation. The Court can conclude, for example, that the award of a domestic court is 'comparable to the amounts awarded by the Court'<sup>20</sup> or that the domestic proceedings 'have not redressed the violation'.<sup>21</sup> These examples demonstrate that the Court does not shy away from supervising execution measures in just satisfaction judgments, although the Court does so just because it is necessary to decide the question of just satisfaction.

14. Still, such influence probably exists. A memorandum of the Department for the Execution of Judgments of the Court, for example, was drafted 'in close co-operation with the Registry' of the Court, see 'Străin and Others against Romania and Maria Atanasu and Others against Romania (and 266 similar cases) group', H/Exec(2013)1, 10 April 2013. Furthermore, the Registry representatives sometimes participate in consultations about general measures with, inter alia, the domestic authorities, see eg Council of Europe, 'Tripartite meeting at the Council of Europe on a draft law to reform the mechanism of compensation or restitution of property nationalised in Romania', 10 April 2013 <goo.gl/qoDhCp>; Council of Europe, 'Multilateral talks: Execution of judgments related to detention conditions in Romania', 1 February 2018 <goo.gl/QXzfKk> accessed 9 May 2019.

15. Rule 75(1) of the Court.

16. A search for judgments on HUDOC on 25 April 2019 with the document-type filter 'Judgment (just satisfaction)' leads to 477 hits. If that filter is excluded, the result for judgments leads to 21,941 results  $(477/21,941) \times 100\% = 2,17\%$ .

17. David Harris and others, *Law of the European Convention on Human Rights* (4th edn, OUP 2018), 165.

18. Keller and Marti (n 9), 848.

19. *Pressos Compania Naviera S.A. and Others v Belgium* App no 17849/91 (ECtHR, 3 July 1997), para 10.

20. *Doina Duca v Moldova* App no 75/07 (ECtHR, 8 April 2014), para 21; See also *Hadzhigeorgievi v Bulgaria* App no 41064/05 (ECtHR, 13 January 2015), paras 17-18; *Karen Poghosyan v Armenia* App no 62356/09 (ECtHR, 29 March 2018), para 9.

21. *De Cubber v Belgium* App no 9186/80 (ECtHR, 14 September 1987), para 21; See also *Piersack v Belgium* App no 8692/79 (ECtHR, 26 October 1984), para 11.

In the just satisfaction judgment *Cyprus v Turkey*, the Court also commented on execution measures.<sup>22</sup> In its preceding judgment on the merits, the Court found that Turkey had committed various violations in northern Cyprus, including violations of the right to the protection of property, because Greek Cypriots were denied access to their property and to compensation.<sup>23</sup> After the adoption of the judgment on the merits and before the Court adopted its just satisfaction judgment, the Court issued a decision in the case of *Demopoulos and Others v Turkey*. Greek Cypriots brought this case to complain about violations by Turkey of their right to the protection of property.<sup>24</sup> The Court declared the complaint inadmissible, because Turkey had created an effective remedy in respect of the complaints.<sup>25</sup> The Court remarked in the just satisfaction judgment in the inter-State case that its decision in *Demopoulos and Others* ‘cannot be considered [...] to dispose of the question of Turkey’s compliance with’ the merits judgment in the inter-State case.<sup>26</sup> Five partly concurring Judges had ‘difficulties’ with this remark, because the remark ‘seeks to extend the powers of the Court and runs counter to [Article 46(2) ECHR] by encroaching on the powers of the Committee’.<sup>27</sup> This example goes to show that the Court may also comment on execution, even though this is not strictly necessary to decide the question of just satisfaction.

## Follow-up cases concerning individual measures

In follow-up cases concerning individual measures, the applicant complains about the individual measures taken to execute a judgment to which he was a party or a lack thereof. Consequently, the Court may supervise the execution of a judgment when adjudicating such a case. The respondent State takes individual measures in response to the legal or factual situation in which the applicant found himself because of a violation. These measures include, for example, conducting a criminal investigation or securing contact between the applicant and his child.

As a rule, follow-up cases concerning individual measures are inadmissible *ratione materiae*,<sup>28</sup> because they are ‘incompatible with’ Article 46(2) ECHR, as this provision prescribes that the Committee is responsible for supervising execution.<sup>29</sup> Nevertheless, some applicants rely directly on this provision to complain that the State failed to execute the judgment. Sub-section 3.1 elaborates on the admissibility of these complaints. More commonly, the applicant relies on one of the substantive Convention rights in a follow-up case concerning individual measures. In response to such complaints, the Court has created a complex body of case-law with exceptions to the rule that follow-up complaints are inadmissible. Sub-section 3.2 discusses these exceptions. Finally, Sub-section 3.3 explains how the Court supervises execution measures when deciding an admissible follow-up case.

22. In the Court’s second inter-State just satisfaction judgment *Georgia v Russia* App no 13255/07 (ECtHR, 31 January 2019), the Court did not make comparable remarks.

23. *Cyprus v Turkey* (n 6), para 4 operative provisions.

24. *Demopoulos and Others v Turkey* App nos 46113/99 and others (ECtHR, 1 March 2010).

25. *ibid* para 127.

26. *Cyprus v Turkey* (n 6), para 63.

27. *ibid*, Partly concurring opinion of Judges Tulkens, Vajić, Raimondi and Bianku, joined by Judge Karakaş, paras 5, 6.

28. In some circumstances, follow-up cases concerning general measures are inadmissible as well, see Section 4 for this.

29. Article 35(3)(a) ECHR; See also Malinverni, (n 11), 362.

## *The admissibility of follow-up complaints concerning individual measures under Article 46 ECHR*

In *Emre v Switzerland (no 2)*, the Court declared the follow-up complaint that the State had committed a violation of Article 8 ECHR, taken together with Article 46 ECHR, admissible and found a violation of both provisions.<sup>30</sup> Since this was the first and the last time that the Court declared a complaint alleging a violation of Article 46 ECHR admissible,<sup>31</sup> the question arises whether the judgment has remained the only of its kind, because *Emre*'s complaint was so exceptional, or, because the Court has returned to the rule that the applicants cannot invoke Article 46 ECHR. This question arises in particular, because the Court held previously that 'it is very doubtful whether Article 46 § 1 may be regarded as conferring upon an applicant a right that can be asserted in proceedings originating in an individual application'.<sup>32</sup>

In *Sidabras and Others v Lithuania*, the applicants invoked Article 46 ECHR because 'the State had not respected their rights, even after the Court had ruled in their favour'.<sup>33</sup> The Court declared this part of the complaint inadmissible *ratione materiae*. In its reasoning leading up to this decision, the Court attempted to reconcile *Emre (no 2)* with its approach of declaring Article 46 ECHR complaints inadmissible by distinguishing the two cases.<sup>34</sup> This attempt was unconvincing,<sup>35</sup> because the Court failed to explain why it could find a violation of Article 46 ECHR in *Emre (no 2)*, despite the task division between itself and the Committee. Moreover, the Court distinguished *Sidabras* from *Emre (no 2)* on incorrect and unconvincing grounds. The first reason to distinguish the two cases was that in *Sidabras*, unlike in *Emre (no 2)*, the State had paid just satisfaction,<sup>36</sup> but this is incorrect as *Emre* received just satisfaction almost two years before the Court adopted the follow-up judgment.<sup>37</sup> Furthermore, the fact that a State has not yet paid just satisfaction is not a convincing reason to adjudicate a case under Article 46 ECHR, because it is the Committee's task to verify if a State has paid just satisfaction as part of its task of supervising the execution of a judgment.<sup>38</sup> The second reason to distinguish was that the complaint in *Sidabras* concerned a general measure and the complaint in *Emre* an individual measure.<sup>39</sup> The Court did not explain why this difference is relevant and because the relevance of this difference is not obvious, this reason does not convince. The Court neither convincingly reconciled *Emre (no 2)* with its approach in other cases nor distinguished it convincingly from *Sidabras* and the Court has never again declared a complaint under Article 46 ECHR admissible.<sup>40</sup> Therefore, it can be

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30. *Emre v Switzerland (no 2)* App no 5056/10 (ECtHR, 11 October 2011), paras 44, 77.

31. See also Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015), 344-345.

32. *UMO Ilinden – PIRIN and Others v Bulgaria (no 2)* (n 6), para 66.

33. *Sidabras and Others v Lithuania* (n 6), para 4.

34. *ibid* paras 84-91.

35. See also *ibid*, Concurring opinion of Judge Keller, paras 1, 7; *ibid*, Joint dissenting opinion of Judges Sajó, Vučinić and Garlicki, paras 6, 7.

36. *Sidabras and Others v Lithuania* (n 6), para 104.

37. On 20 October 2008, see *Switzerland*, 'Plan d'action', DH-DD(2012)401, 12 April 2012. See also *Emre v Switzerland (no 2)* (n 30), paras 28, 35 where the applicant and the State agree that just satisfaction was paid.

38. Article 46(2) ECHR. Moreover, the Committee does this in practice, see eg Committee, *Annual Report 2017* (2018), 80-84.

39. *Sidabras and Others v Lithuania* (n 6), para 104.

40. In eg this case, the Court declared an Article 46 complaint inadmissible: *Kontalexis v Greece* App no 29321/13 (ECtHR, 6 September 2018), para 63.



assumed that the Court sees *Emre (no 2)*, albeit without admitting this, as a deviation from its case-law that it will not repeat. This deviation could occur probably because not all Strasbourg Judges agree that the Court should not play a role in supervising execution, as was also noted in Section 1 of this article. This assumption is also based on the fact that even Judges Raimondi and Tulkens, who voted with the majority in *Emre (no 2)* in 2011,<sup>41</sup> had difficulties with the remark of the Court in *Cyprus v Turkey* in 2014, as cited in Section 2. This implies that they also think that supervising execution is the Committee's task, which would exclude adjudicating a case under Article 46 ECHR. Consequently, I will assume that the Court will declare complaints under this provision inadmissible.

### *The admissibility of follow-up complaints concerning individual measures under the substantive Convention rights*

The exception to the rule that follow-up complaints concerning individual measures brought under one of the substantive Convention rights are inadmissible is that the applicant raises a new issue.<sup>42</sup> A new issue is, for example, a fresh examination of the applicant's appeal,<sup>43</sup> an entire new set of domestic legal proceedings<sup>44</sup> or the conversion of an exclusion order from a permanent into a ten-year order.<sup>45</sup> The reopening of domestic proceedings constitutes a new issue when it leads to, for example, a partial rather than a total prohibition on certain speech.<sup>46</sup> For the admissibility of a follow-up complaint, the Court does not require, however, that the applicant's factual situation has changed. It is sufficient that the domestic judges undertook a new balancing of interests in response to the first Strasbourg judgment.<sup>47</sup> Even a refusal to review a domestic judgment constitutes a new issue, when the complaint concerns the 'lack of fairness of the procedure followed' and, more specifically, the errors in the reasoning of the domestic judges.<sup>48</sup> The Court has declared a complaint about a refusal to revise a domestic judgment admissible, because the domestic judges relied on new grounds for their repeated refusal.<sup>49</sup>

A new issue exists in other circumstances as well: when the violation established in the first judgment continues to exist 'during a certain period of time'.<sup>50</sup> A continuing violation takes place, for example, when the applicant remains in detention despite a violation of the right to liberty and security.<sup>51</sup> In the follow-up case, the Court examines 'the new periods concerned and any new complaints invoked in this respect'.<sup>52</sup> Even something that is continuing can therefore be a new issue for the purpose of admissibility.

41. Only two Judges voted against the finding of a violation of Article 8 ECHR, in conjunction with Article 46 ECHR. The dissenting opinion reveals that the Judges who voted against were not the Judges mentioned above.

42. *Guja v Moldova (no 2)* App no 14277/04 (ECtHR, 12 February 2008), para 36.

43. *Drassich v Italy (no 2)* App no 65173/09 (ECtHR, 22 February 2018).

44. *Liu v Russia (no 2)* App no 29157/09 (ECtHR, 26 July 2011), para 65; *UMO Ilinden – PIRIN and Others v Bulgaria (no 2)* (n 6), para 64.

45. *Mehemi v France (no 2)* ECHR 2003-IV 291, para 43.

46. *Hertel v Switzerland* ECHR 2002-I 527.

47. *Emre v Switzerland (no 2)* (n 30).

48. *Moreira Ferreira v Portugal (no 2)* (n 11), para 56; *Kontalexis v Greece* (n 40), paras 27-28.

49. *VgT v Switzerland (no 2)* (n 6), para 65. Cf *Meltex Ltd v Armenia* App no 45199/09 (ECtHR, 21 May 2013).

50. *Kudeshkina v Russia* (n 1), para 62; See also *Malinverni* (n 11).

51. *Ivanfoc and Others v Moldova and Russia* (n 3), paras 93-96.

52. *Egmez v Cyprus* (n 7), para 53.



A new issue does not exist if the applicant complains that the State failed to remedy a violation.<sup>53</sup> This includes the complaint that an investigation conducted to execute the first judgment was not genuine<sup>54</sup> and that a refusal to reopen meant that the violation has not been remedied.<sup>55</sup> Complaints about a refusal to reopen are also inadmissible if the domestic judges simply restated, in a decision following a Strasbourg judgment, the reasoning that they relied on previously.<sup>56</sup> Furthermore, these complaints are inadmissible if the applicant failed to comply with the domestic legal requirements for reopening<sup>57</sup> and if domestic law does not make reopening possible,<sup>58</sup> even when the domestic court's judgment 'is not wholly in compliance with the first Strasbourg judgment'.<sup>59</sup>

In many follow-up judgments, the Court notes whether the Committee has terminated the execution proceedings in the first case, although this is 'immaterial' '[i]n so far as the fresh [application] raises a new issue'.<sup>60</sup> Furthermore, the Committee's continued or discontinued supervision is never decisive in establishing whether a new issue exists,<sup>61</sup> but rather seems to strengthen the conclusion on this point that the Court reaches regardless of whether the Committee is still involved. To illustrate, when the Court concludes that a new issue exists, the fact that the Committee has closed its supervision without awaiting the outcome of fresh domestic proceedings may reinforce that conclusion.<sup>62</sup> When the Court determines that there is no new issue, it can note, additionally, that the Committee closed its supervision<sup>63</sup> (whilst taking into account the outcome of fresh domestic proceedings).<sup>64</sup> The fact that the Committee, when ending supervision, made a statement as to what was required of the domestic judges that 'may not be clear' according to the Court, will not change the Court's conclusion that there is no new issue.<sup>65</sup> This also goes to show that the Committee's actions are not relevant to the determination of whether there is a new issue.

In short, a new issue exists if the applicant does not complain that the State failed to execute the first judgment. Those domestic decisions that result in a new outcome or that are based on new grounds constitute a new issue. A refusal to review a domestic judgment is a new issue when the complaint concerns errors in the reasoning or any new grounds on which the domestic judges relied; one cannot complain about the refusal itself. Additionally, one cannot complain about the refusal if the domestic judges did not rely on new grounds, if one did not fulfil domestic law criteria for reopening or if domestic law does provide for reopening. A new issue also exists when the

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53. *Krémář and Others v Czech Republic* App no 69190/01 (ECtHR, 30 March 2004); *Komanický v Slovakia* App no 13677/03 (ECtHR, 1 March 2005); *Öcalan v Turkey* App no 5980/07 (ECtHR, 6 July 2010); *Dowsett v the UK (no 2)* App no 8559/08 (ECtHR, 4 January 2011); *Bochan v Ukraine (no 2)* (n 1), para 35; *Tsalkitzis v Greece (no 2)* App no 72624/10 (ECtHR, 19 October 2017), para 26.

54. *Egmez v Cyprus* (n 7).

55. *Lyons and Others v the UK* App no 15227/03 (ECtHR, 8 July 2003); See also *Steck-Risch and Others v Liechtenstein* App no 629061/08 (ECtHR, 11 May 2010); *Schelling v Austria (no 2)* App no 46128/07 (ECtHR, 16 September 2010).

56. *Kudeshkina v Russia* (n 1), para 85.

57. *Schelling v Austria (no 2)* (n 55).

58. *Storck v Germany* App no 486/14 (ECtHR, 26 June 2018), para 96.

59. *Steck-Risch and Others v Liechtenstein* (n 55).

60. *Kudeshkina v Russia* (n 1), para 59; See also *Guja v Moldova (no 2)* (n 42), paras 36, 38.

61. *Eg Moreira Ferreira v Portugal (no 2)* (n 11), para 57.

62. See eg *VgT v Switzerland (no 2)* (n 6), para 67; *Drassich v Italy (no 2)* (n 43), paras 45-47.

63. *Krémář and Others v Czech Republic* (n 53).

64. *Öcalan v Turkey* (n 53) (the complaint discussed under I); *Dowsett v the UK (no 2)* (n 53).

65. *Storck v Germany* (n 58), para 99.

violation is continuing. Whether the Committee is still supervising the first judgment is not decisive.

The foregoing implies that it is apparently no longer<sup>66</sup> required that the applicant's factual situation has changed,<sup>67</sup> although the Court sometimes alludes to new facts in connection with the admissibility of a follow-up complaint.<sup>68</sup> A refusal to reopen, albeit on new grounds, for example, does not change the applicant's factual situation. Because the Court does not require new facts, the first and the follow-up complaint can be 'essentially identical'<sup>69</sup> and the Court has much discretion to declare a follow-up complaint admissible.<sup>70</sup> Consequently, the distinction between different follow-up cases concerning individual measures is, according to the Court, 'not always clear-cut',<sup>71</sup> and the corresponding case-law is, according to some Judges, 'ambiguous and partly contradictory'.<sup>72</sup> To illustrate, one can wonder why an investigation that took place to execute the first judgment is not a new issue, whereas the reopening of the applicant's case that took place for the same purpose is a new issue.

### Supervision by the Court

This Section discusses the Court's supervision of execution when deciding admissible follow-up cases. For this purpose, the follow-up judgments are divided into three categories.

The first category consists of judgments concerning a continuing violation. In these judgments, the Court engages clearly in supervising execution, since executing a judgment requires ending a violation.<sup>73</sup> Therefore, a failure to end a violation is a failure to execute a judgment and an execution problem as well. Furthermore, the Court finds a violation in the follow-up case because of the lack of execution measures. In one case, the Court dealt with, for example, the applicants' continued detention, despite a violation of the right to liberty and security.<sup>74</sup> The continued detention is an execution problem, especially considering that the Committee suspended its examination of the first case because the Court would decide the follow-up complaint.<sup>75</sup> If the Court would not be handling an execution problem, the Committee would not have to suspend its involvement. The Court seems to disagree that it supervises execution when adjudicating on continuing violations. In a case about the continued non-enforcement of a

66. In *Lyons and Others v the UK* (n 55), the Court held: '[T]he applicants' argument that a new breach of Article 6 has been committed rests essentially on their view that by refusing to quash their convictions or to order a re-trial, the domestic courts have failed to give effect to its finding that they did not receive a fair hearing'. Therefore, the Court declared the complaints inadmissible. In *Moreira Ferreira v Portugal (no 2)* (n 11) and *VgT v Switzerland (no 2)* (n 6), the Court departed from *Lyons and Others* (n 55).

67. Cf Hertig Randall and Ruedin (n 10) 425.

68. eg *Wasserman v Russia (no 2)* App no 21071/05 (ECtHR, 10 April 2008), para 36.

69. *Moreira Ferreira v Portugal (no 2)* (n 11), Joint dissenting opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbø and O'Leary, para 7; These Judges are of the opinion that the Court's competence 'is ... conditional upon the requirement of there being new facts', see *idem*, para 6.

70. See also Hertig Randall and Ruedin (n 10), 431.

71. *Guja v Moldova (no 2)* (n 42), para 36.

72. *Moreira Ferreira v Portugal (no 2)* (n 11), Joint dissenting opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbø and O'Leary, para 28.

73. See also Section 1; *Ilaşcu and Others v Moldova and Russia* ECHR 2004-VII 1, para 75; *Liu v Russia (no 2)* (n 44), para 66.

74. *Ivanțoc and Others v Moldova and Russia* (n 3).

75. Committee, 'Interim Resolution CM/ResDH(2007)106', 12 July 2007.

domestic judgment, the Court explained that, ‘in so far as the applicant’s complaint concerns’ the period following the first judgment, this matter falls ‘outside the scope of supervision exercised by the Committee’.<sup>76</sup>

In the second category of follow-up cases, the Court verifies whether the domestic judges ruled ‘consistent with the “conclusions and spirit”’ of the first Strasbourg judgment.<sup>77</sup> The fresh domestic judgment is the execution measure that is taken to execute the Strasbourg judgment and, therefore, by examining that judgment, the Court engages in supervising execution. As the domestic judges enjoy a margin of appreciation in their interpretation of the Strasbourg judgment, the Court does not ‘express a position on the validity of’ their interpretation.<sup>78</sup> Instead, the Court satisfies itself that their ‘judgment was not arbitrary, that is to say that [they] [...] did not distort or misrepresent the [first] judgment’.<sup>79</sup> The Court’s review, therefore, is deferential, because the domestic judges have a broad margin of appreciation and because the Court only establishes if the domestic judges’ interpretation was arbitrary. In *Emre v Switzerland (no 2)*, the Court exceptionally required more of the domestic judges: that their assessment of the first judgment was ‘complete and convincing’.<sup>80</sup> On top of that, the Court explained what would have been ‘the most natural execution of its [first] judgment’.<sup>81</sup>

In the third category, the Court does not examine the domestic judgment in light of the first Strasbourg judgment specifically, but in light of the Convention requirements generally, as they can be derived from its case-law. For example, when the Court found, in its first judgment, a violation of Article 10 ECHR because of the applicant’s dismissal from his job it can examine subsequently whether the second dismissal also violates that provision.<sup>82</sup> Although the Court uses a different benchmark than in the second category of follow-up cases, the Court is also engaged in supervising the implementation of the execution measure. This does, however, not necessarily imply that the Court will pronounce itself on which measure should have been taken. In, for example, the aforementioned Article 10 ECHR case, the Court thought it unnecessary to establish whether the first judgment required reinstating the applicant in his position.<sup>83</sup> In another case, however, the Court did ‘ascertain whether, in view of the importance of the execution of its judgments [...], the respondent State had a positive obligation to take the necessary measures to allow the television commercial in issue to be broadcast following the Court’s finding of a violation of Article 10’ ECHR.<sup>84</sup> Put differently, the Court established which execution measure the State had to take and found a violation because the State had failed to take that measure.<sup>85</sup>

76. *Wasserman v Russia (no 2)* (n 68), para 37.

77. *Emre v Switzerland (no 2)* (n 30), paras 68, 71; *Tsalkitzis v Greece (no 2)* (n 53), para 55.

78. *Emre v Switzerland (no 2)* (n 30), paras 68; *Tsalkitzis v Greece (no 2)* (n 53), para 55; *Moreira Ferreira v Portugal (no 2)* (n 11), para 95; *Kontalexis v Greece* (n 40), para 58.

79. *Tsalkitzis v Greece (no 2)* (n 53), para 55; See also *Bochan v Ukraine (no 2)* (n 1), para 63; *Moreira Ferreira v Portugal (no 2)* (n 11), para 96; *Kontalexis v Greece* (supra n 40), paras 58-59.

80. *Emre v Switzerland (no 2)* (n 30), para 71.

81. *ibid*, para 75.

82. *Guja v Moldova (no 2)* (n 42), para 37.

83. *ibid*, para 48.

84. *VgT v Switzerland (no 2)* (n 6), para 91; See for an elaborate discussion of this case Hertig Randall and Ruedin (n 10) 421-443.

85. *VgT v Switzerland (no 2)* (n 6), para 98.

When declaring a follow-up complaint admissible, the Court sometimes admits that the complaint ‘incontrovertibly concerned the execution of the’ first judgment.<sup>86</sup> The above analysis confirms this: depending on in which category the follow-up case falls, the Court engages in supervising execution in a more or less deferential manner.<sup>87</sup>

## Follow-up cases concerning general measures

Other follow-up cases concern the effect of general execution measures on the applicant. These measures often take the form of amending domestic legislation, but may also require taking administrative measures to, for example, ensure access of prisoners to documents necessary for bringing a case before the Court.<sup>88</sup> General measures do not only affect the applicant in the first case, but also other persons. Therefore, it is not necessary that the applicant who brought the first case also brings the follow-up complaint. The admissibility of general follow-up cases is only an issue if the follow-up complaint is brought by the same applicant as the one who brought the first case. If that is the case, the rules for the admissibility of follow-up cases as discussed in Section 3.2 apply. For the purpose of examining the Court’s involvement in execution when deciding on cases in which general measures are at stake, six follow-up cases in which the Court commented on (the lack of) general measures are discussed.

In *Von Hannover v Germany (no 2)*, the Court explained that ‘it is not its task [...] to examine’ whether Germany had ‘satisfied its obligations under Article 46 [...] regarding execution’ of the first judgment, ‘as that task is the responsibility of the Committee’.<sup>89</sup> Additionally, the Court only neutrally took ‘note of the changes made by’ the domestic judges to their case-law<sup>90</sup> and it refused to review the domestic case-law – the execution measure – ‘*in abstracto*’.<sup>91</sup> Instead, the Court established whether the application of the case-law to the case of the applicants infringed the Convention.<sup>92</sup> Still, the Court observed that ‘the national courts explicitly took account of’ its case-law and that one court had undertaken ‘a detailed analysis’ of said case-law.<sup>93</sup> The Court thus signalled is approval of the domestic judgments. The Court’s finding that no violation had taken place implied that the changes in the domestic case-law complied with the Convention.<sup>94</sup> Therefore, although the Court’s analysis was based on the case of the applicants, by deciding their case, it approved a general execution measure.<sup>95</sup>

In another German follow-up case, *Bergmann v Germany*, the Court welcomed ‘the extensive measures which have been taken [...] on judicial, legislative and executive levels with a view to’ ensuring respect for the Convention.<sup>96</sup> Germany took these measures in response to previous

86. *Moreira Ferreira v Portugal (no 2)* (n 11), para 54; See also *UMO Ilinden – PIRIN and Others v Bulgaria (no 2)* (n 6), para 80; *Bochan v Ukraine (no 2)* (n 1), para 37.

87. See also *Malinverni* (n 11) 364.

88. *Vasiliy Ivashchenko v Ukraine* App No 760/03 (ECtHR, 26 July 2012), para 125.

89. *Von Hannover v Germany (no 2)* ECHR 2012-I 351, para 94.

90. *ibid* para 114.

91. *ibid* para 116.

92. *ibid*.

93. *ibid*, para 125.

94. See also Amrei Müller, ‘The ECtHR’s Engagement with German and Russian Courts’ Decisions’ in Amrei Müller and Hege Elisabeth Kjos (eds), *Judicial Dialogue and Human Rights* (CUP 2017), 301.

95. See also Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015), 38.

96. *Bergmann v Germany* App no 23279/14 (ECtHR, 7 January 2016), para 123.

judgments finding Convention violations. Again, the Court signalled its approval of the general measures. Subsequently, the Court concluded that no violation had taken place.<sup>97</sup> In the absence of the execution measures, the Court would not have come to this conclusion. Therefore, the Court hinted that the execution measures were up to standard, again by reviewing the individual complaint.

In *Sidabras and Others v Lithuania*, the Court noted that the State had not abrogated the law that had caused violations in previous cases.<sup>98</sup> The Court then remarked that ‘the abrogation of [that law] must have constituted the most appropriate general measure [...] to remedy the domestic legal situation forming the basis of the Court’s’ previous judgment.<sup>99</sup> This remark makes clear how the previous judgment should have been executed. Moreover, the finding of a violation because of the application of the unchanged law to the applicant implies that Lithuania had not taken the general measures required to execute the previous judgments.<sup>100</sup> The findings in this individual case, like in the German judgments, therefore, can be used to understand whether a previous judgment has been executed. Like in *Von Hannover (no 2)*, the Court demonstrated its awareness of the Committee’s task by observing that ‘it is for the Committee [...] to supervise the execution of such general measures’.<sup>101</sup>

The Court sometimes has to review general measures more directly than in the above three cases to solve the issue of an individual violation. In *A.S.P.A.S. et Lasgrezas v France* for example, the question was whether the new domestic-law provisions, adopted to execute a previous judgment, struck a fair balance between the applicant’s right and the requirements of the general interest.<sup>102</sup> The Court concluded that, considering the margin of appreciation of the State, this balance was struck and that no violation had taken place.<sup>103</sup> Thus, the Court approved the new domestic-law provisions.<sup>104</sup>

When confronted with many follow-up cases concerning the excessive length of judicial proceedings in Italy, the Court simply found that there was a ‘continuing situation that has not yet been remedied’.<sup>105</sup> The Court thus pointed out clearly that the previous judgments had not been executed by taking general measures. In a posterior follow-up judgment, the Court dealt with cases of applicants who had used the domestic remedy created for the length of proceedings problem. This remedy also violated the Convention.<sup>106</sup> The Court, therefore, concluded that the execution measure did not live up to the Convention standards.

Finally, the three cases against Russia of *Isayeva*,<sup>107</sup> *Abuyeva and Others*<sup>108</sup> and *Abakarova*<sup>109</sup> concern the same assault of the security forces. In the first judgment, the Court found a violation of,

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97. *ibid.*, para 134.

98. *Sidabras and Others v Lithuania* (n 6), paras 61-63.

99. *ibid.* para 104.

100. *ibid.* para 115.

101. *ibid.* para 104.

102. *A.S.P.A.S. et Lasgrezas v France* App no 29953/08 (ECtHR, 22 September 2011), para 38.

103. *ibid.* paras 43-44.

104. See also *Chabauty v France* App no 57412/08 (ECtHR, 4 October 2012), para 45.

105. *Bottazzi v Italy* ECHR 1999-V, para 22.

106. *Gaglione and Others v Italy* App no 45867/07 and others (ECtHR, 21 December 2010), paras 38, 51.

107. *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005).

108. *Abuyeva and Others v Russia* App no 27065/05 (ECtHR, 2 December 2010).

109. *Abakarova v Russia* App no 16664/07 (ECtHR, 15 October 2015).

inter alia, the right to life, because the authorities had failed to investigate the assault effectively.<sup>110</sup> Five years later, the Court found the same violation in *Abuyeva and Others*.<sup>111</sup> In this judgment, the Court examined the investigation that was carried out after *Isayeva* and it concluded that the investigation 'had suffered from the exact same defects as those identified in the first set of proceedings'.<sup>112</sup> Another five years later, the Court concluded in *Abakarova* that 'no previously identified defect of the investigation has been resolved'.<sup>113</sup> In the two follow-up cases, the Court's conclusions about the investigation came down to establishing that the required general measure – conducting an investigation in line with the Convention requirements – had not been taken.

The discussion of the follow-up cases concerning general measures reveals that the Court may express its approval of the measures that the domestic authorities took to execute a previous judgment, albeit in general terms. Alternatively, the Court may, again in general terms, tell the State how a judgment should have been executed or it may find that a previous judgment has not been executed. In the follow-up judgment, the Court may rely for its examination on both its case-law in general and the first judgment or mainly on the first judgment. Furthermore, it is clear that, by deciding an individual application, the Court may evaluate more or less directly the general execution measure. Therefore, the individual case cannot always be seen in isolation from the general measures that the State took. The foregoing means that the Court is involved in supervising execution in general follow-up cases, in a direct or indirect manner. In two cases, the Court demonstrated its awareness of the Committee's role in this regard and the Court remains careful not to review general measures *in abstracto*.

## Pilot judgments

In a pilot judgment, the Court identifies a structural problem and indicates which general measures the State must take to remedy that problem within a certain time limit.<sup>114</sup> According to the Court, its role in the pilot-judgment procedure ('PJP') is 'essentially limited' to these two elements.<sup>115</sup> Consequently, it is the Committee's task 'to supervise the execution of the judgment'.<sup>116</sup>

Nevertheless, the Court adopts follow-up decisions to decide whether it can declare similar applications inadmissible for a failure to exhaust a newly created domestic remedy.<sup>117</sup> Alternatively, the Court can strike such applications out, because 'the matter has been resolved',<sup>118</sup> which is the case if the domestic remedy no longer justifies further examination of similar applications.<sup>119</sup> The Court, therefore, assesses compensatory remedies, which 'provide for damages to persons

110. *Isayeva v Russia* (n 107), para 224.

111. *Abuyeva and Others v Russia* (n 108), para 216.

112. *ibid* para 215.

113. *Abakarova v Russia* (n 109), para 111.

114. Rule 61(3-4) of the Court; See for more information about the PJP: Antoine Buyse, 'Flying or Landing? The Pilot Judgment Procedure in the Changing European Human Rights Architecture' in Oddný Mjöll Arnardóttir and Antoine Buyse, *Shifting Centres of Gravity in Human Rights Protection. Rethinking Relations between the ECHR, EU and National Legal Orders* (Routledge 2016); Eline Kindt, 'Giving up on individual justice? The effect of state non-execution of a pilot judgment on victims' (2018) 36 *Netherlands Quarterly of Human Rights* 173, 175-180.

115. *Burmych and Others v Ukraine* App no 46852/13 and others (ECtHR, 12 October 2017), para 159.

116. *ibid*, para 194.

117. Article 35(1) ECHR.

118. Article 37(1)(b) ECHR.

119. *Wolkenberg and Others v Poland* App no 50003/99 (ECtHR, 4 December 2007), para 77.



subjected to the violations caused by the problem'.<sup>120</sup> Sometimes the Court's assessment is rather elaborate<sup>121</sup> and it may also look at how a remedy operates in practice.<sup>122</sup> More commonly, however, the Court decides based on the relevant new law as such and accepts the remedy even though the domestic courts have not yet established 'any stable practice'.<sup>123</sup> In these circumstances, the Court usually adds that its 'position may be subject to review [...] depending [...] on the domestic courts' capacity to establish consistent case-law [...] in line with the Convention'.<sup>124</sup> Exceptionally, the Court reviews its position and concludes that the domestic case-law is not Convention compliant.<sup>125</sup> In other cases, the Court concludes already in its first follow-up ruling that the remedy is not up to scratch.<sup>126</sup> When the Court decides after the Committee closed its supervision of a pilot judgment, the Court will follow the Committee and approve the remedy without any reservation.<sup>127</sup> In cases where the Court cannot rely on a resolution of the Committee, which is usually the case, the Court relies on its case-law and the pilot judgment to evaluate the general measures.<sup>128</sup>

The situation regarding preventive remedies, which prevent future violations by solving the structural problem rather than remedy past violations, is different. In many pilot judgments, the Court is already less concerned with preventive remedies than with compensatory remedies, as it does not always order the former in the operative provisions.<sup>129</sup> Comparably, in the follow-up decisions, the Court usually does not supervise the execution of preventive remedies,<sup>130</sup> probably because this is not necessary to take an inadmissibility or strike-out decision. Another reason may be that the Committee is 'better placed and equipped to monitor' preventive remedies, because structural problems 'are large-scale and complex in nature' and '*prima facie* require the implementation of comprehensive and complex measures'.<sup>131</sup> At most, the Court may regret that no preventive remedy is in place,<sup>132</sup> but this finding has no consequences for its findings in the individual case.

120. Lize R Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2016) 34 *Netherlands Quarterly of Human Rights* 41, 52.

121. eg *Valcheva and Abrashev v Bulgaria* App nos 6194/11 and 34887/11 (ECtHR, 18 June 2013), paras 97-120; *Techniki Olympiaki A.E. v Greece* App no 40547/10 (ECtHR, 1 October 2013), paras 41-57; *Xynos v Greece* App no 30226/09 (ECtHR, 9 October 2014), paras 41-51. cf *The Association of Real Property Owners in Łódź v Poland* App no 3485/02 (ECtHR, 8 March 2011), para 73.

122. *Wolkenberg and Others v Poland* (n 119), para 35 and see also paras 66, 71; *The Association of Real Property Owners in Łódź v Poland* (n 121), para 71.

123. *Nagovitsyn and Nalgiyev v Russia* App nos 27451/09 and 60650/09 (ECtHR, 23 September 2010), para 30; See also *Association of Real Property Owners in Łódź v Poland* (n 121), para. 81.

124. *Nagovitsyn and Nalgiyev v Russia* (n 123), para 42; See also *Balan v the Republic of Moldova* App no 44746/08 (ECtHR, 10 February 2012), paras 19, 27; *Taron v Germany*, App no 53126/07 (ECtHR, 29 May 2012), paras 40, 45; *Preda and Others v Romania* App no 9584/02 and others (ECtHR, 29 April 2014), paras 129, 133.

125. *Ilyushkin and Others v Russia* App no 5734/08 and others (ECtHR, 17 April 2012), paras 36-38; See also *Burmych and Others v Ukraine* (n 115), para 37.

126. *Kharuk and Others v Ukraine* App no 703/05 (ECtHR, 26 July 2012), para 18; *Preda and Others v Romania* (n 124), para 130.

127. *Zadrić v Bosnia and Herzegovina* App no 18804/04 (ECtHR, 16 November 2010); *Anastasov and Others v Slovenia* App no 65020/13 (ECtHR, 18 October 2016), paras 87, 97.

128. See eg *Nagovitsyn and Nalgiyev v Russia* (n 124), paras 27-45.

129. Glas (n 120) 52, 58.

130. See for an exception *Techniki Olympiaki A.E. v Greece* (n 121), para 38.

131. *Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009), para 90.

132. *Xynos v Greece* (n 121), para 54.



As noted, the Court may set a deadline for the adoption of remedial measures. Since the States often fail to abide by the deadline, they frequently request an extension from the Court.<sup>133</sup> In one judgment, the Court held that ‘this was a matter which should be taken up with the Committee’.<sup>134</sup> If the Court really is of this opinion, then it often took on the Committee’s supervisory task, because, it did grant requests for an extension of a deadline in other PJPs.<sup>135</sup>

In conclusion, the PJP has ‘added a new dimension’ to the Court’s task,<sup>136</sup> because the Court has become involved in supervising the execution of compensatory remedies.<sup>137</sup> By deciding on the requests for an extension of the deadline for taking execution measures, the Court also is involved in execution matters. The Court’s involvement does not mean that it supervises the same aspects of execution as the Committee. After the Court approves the compensatory remedy, often without knowing how it functions, the Committee will usually continue to supervise how the remedy functions.<sup>138</sup> Furthermore, unlike in the case of compensatory remedies, the Court does normally not supervise the execution of preventive remedies. Moreover, the Court will follow the Committee when the latter accepted the implemented execution measures.

## Conclusion

This article set out with the aim of examining whether the Court is involved in supervising the execution of its judgments. The analysis of the four aspects of the Court’s procedural practice has demonstrated that the Court engages in supervising execution when dealing with those aspects, albeit in different ways, as is explained below. Therefore, even though the Court has held repeatedly that it does not have jurisdiction to engage in this exercise, it verifies occasionally whether a State complied with its judgment. As Malinverni put it, some cracks have appeared in the wall separating the Court’s and the Committee’s task.<sup>139</sup>

However, these cracks do not mean that the Court is encroaching on the Committee’s task. On the contrary, when reviewing general measures, the Court may explain that it is aware of the Committee’s role and, in the PJP, the Court follows the Committee when possible and leaves the matter of preventive remedies wholly to the Committee. Furthermore, in follow-up cases concerning individual measures, the Court always carefully checks whether a new issue exists in order to avoid that it does the Committee’s job.

Moreover, supervising execution has not become in any way part of the Court’s day-to-day work.<sup>140</sup> The situation is the opposite: the procedural practices as part of which the Court supervises execution measures are rare occurrences in the Court’s procedural practice and are outnumbered by far by judgments in which none of the four procedural practices play any role at all. Consequently, the Court supervising execution is a rare occurrence. Therefore, there is certainly room for more involvement of the Court in execution matters, should the unlikely result of

133. Glas (n 120) 65.

134. *Kurić and Others v Slovenia* (n 1), para 12.

135. Glas (n 120) 65.

136. *Burmych v Ukraine* (n 115), para 141.

137. See also Keller and Marti (n 9) 848; Buyse (n 114) 114.

138. eg Committee, Decision CM/Del/Dec(2013)1179/7, 26 September 2013, paras 2-3; Committee, Decision CM/Del/Dec(2014)1214/6, 4 December 2014, paras 1, 3; Committee, Decision CM/Del/Dec(2017)1288/H46-27, 7 June 2017, paras 3-4; Committee, Decision CM/Del/Dec(2018)1310/H46-4, 15 March 2018; See also Kindt (n 114) 180.

139. Malinverni (n 11), 374.

140. See also Keller and Marti (n 9), 846, 849.

the debate between the Judges as to the desirability of increasing such involvement be that this is indeed desirable.<sup>141</sup>

When the Court supervises execution, this is usually the inevitable consequence of what a procedural practice requires it to do. To illustrate, the Court must supervise execution to establish whether it has to award compensation in a just satisfaction judgment. The Court may pronounce itself on execution in a follow-up case concerning general measures, because this is necessary to 'solve' the question of an individual violation. In the PJP, the Court must review compensatory measures in order to establish whether it can declare the complaint inadmissible or strike it out for a failure to exhaust domestic remedies. Sometimes, however, the Court remarks on execution, even though this is not strictly necessary to decide the case. This happened when the Court added the remark that was discussed in Section 2 in *Cyprus v Turkey* and this also happens in some follow-up cases concerning general measures. Furthermore, one could argue that the Court's involvement in follow-up cases concerning individual measures is unnecessarily far-reaching, because the applicant's factual situation need not to have changed for admissibility. If the Court would again require this, as some Judges propose,<sup>142</sup> its involvement in supervising execution would decrease in one respect.

This article also aimed to examine what the Court does when supervising execution. This will be explained by outlining what the Court supervises, which benchmarks it uses for supervision and the manner in which it supervises.

In just satisfaction judgments and in some individual follow-up judgments, the Court assesses individual measures. Additionally, in follow-up cases concerning general measures and in pilot judgments, the Court supervises the implementation of general measures, whilst limiting itself to reviewing compensatory measures in pilot judgments. In short, what the Court supervises depends on the procedural practice of interest.

The benchmark that the Court relies upon differs. In just satisfaction judgments, the Court uses Article 41 ECHR. In follow-up cases concerning individual measures, its benchmark is either its first judgment or its case-law more in general and, in follow-up cases concerning general measures, the Court relies mainly on the first judgment or on its case-law in general and the first judgment as well. In the course of the PJP, the Court relies on both its pilot judgment and its case-law in general. This enumeration of benchmarks demonstrates, that, although the Court is engaged in supervising execution, it does not use Article 46(1) ECHR as such as its benchmark,<sup>143</sup> but oftentimes its previous judgment.

The manner of the Court's supervision differs as well. In just satisfaction judgments, the Court examines the execution measures fully and directly. Depending on the category of follow-up case concerning individual measures, the Court's review is more or less deferential. In follow-up cases concerning general measures, the Court will only review the execution measure in a general fashion and sometimes only indirectly through its findings regarding the individual complaint. Compared to follow-up cases concerning general measures, the Court supervises the general measures in the PJP in more detail and more directly, although it remains quite

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141. See Section 1.

142. *VgT v Switzerland (no 2)* (n 6), Dissenting opinion of Judge Malinverni joined by Judges Birsan, Myjer and Berro-Lefèvre, para 3, 8-13; *Moreira Ferreira v Portugal (no 2)* (n 11), Joint dissenting opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjölbrot and O'Leary, para 4.

143. Which could imply that it looks at the aspects dealt with in footnote 2.

deferential. Again, depending on the procedural aspect one looks at, the Court's manner of supervision differs.

This article has shown that and how the Court sometimes supervises the execution of its judgments, even though the Court avoids admitting this. Rather than refusing to admit it, it may be easier for the Court to explain why it is sometimes unavoidable to supervise execution measures more or less directly. Additionally, the Court could point out that its occasional engagement in execution does not necessarily mean that it copies the Committee's task. Such explanations better reflect reality and are, therefore, more convincing than denying what happens in practice. These explanations also help avoid that the Court has to construct a, at times, rather artificial 'new issue' in individual follow-up cases. The proposed approach would also mean that, if the Court cannot justify its involvement as unavoidable and as different from the Committee's work, it should probably reconsider whether it really needs to comment on execution matters.

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